

Mediation and Lawyers

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A mediator helps disputants toward resolving their disagreement. Unlike a judge or arbitrator, however, the mediator lacks authority to impose a decision on the parties; he can only facilitate the process.¹ Mediation has been and remains the dominant method of processing disputes in some quarters of the world.² In parts of the Orient litigation is seen as a shameful last resort, the use of which signifies embarrassing failure to settle the matter amicably.³ Though it is unclear to what extent philosophy influences practice, the connection between the prominence of mediation and a Confucian heritage has been noted repeatedly by scholars.⁴ In the Confucian view,

[a] lawsuit symbolized disruption of the natural harmony that was thought to exist in human affairs. Law was backed by coercion, and therefore tainted in the eyes of Confucianists. Their view was that the optimum resolution of most disputes was to be achieved not by the exercise of sovereign force but by moral persuasion. Moreover, litigation led to litigiousness and to shameless concern for one's own interest to the detriment of the interests of society.⁵

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1. P. GULLIVER, DISPUTES AND NEGOTIATIONS: A CROSS-CULTURAL PERSPECTIVE 209 (1979). See Eckoff, *The Mediator, the Judge and the Administrator in Conflict-Resolution*, 10 ACTA SOCIOLOGICA 148, 158-61 (1967). See text accompanying note 54 *infra*, for a discussion of the variety of methods used by mediators.

2. See 1 D. HENDERSON, CONCILIATION AND JAPANESE LAW 1-3 (1965); Cohen, *Chinese Mediation on the Eve of Modernization*, 54 CALIF. L. REV. 1201, 1201 (1966); Hahn, *The Decision Process in Korea in COMPARATIVE JUDICIAL BEHAVIOR* 19, 19-20 (G. Schubert & D. Danielski eds. 1969); Lubman, *Mao and Mediation: Politics and Dispute Resolution in Communist China*, 55 CALIF. L. REV. 1284, 1285-86 (1967); Marasinghe, *The Use of Conciliation for Dispute Settlement: The Sri Lanka Experience*, 29 INT'L & COMP. L.Q. 389, 393-400 (1980).

3. Cohen, *supra* note 2, at 1206-07.

4. *Id.* at 1207. See also Northrop, *The Mediation Approval Theory in American Legal Realism*, 44 VA. L. REV. 347, 349 (1958).

In China up to the end of the 19th century, mediation was helped along by an enormously corrupt court system that the Emperors had no desire to improve. In the words of the K'ang-hsi Emperor (1662-1722); [L]awsuits would tend to increase to a frightful amount, if people were not afraid of the tribunals, and if they felt confident of always finding in them ready and perfect justice. As man is apt to delude himself concerning his own interests, contests would then be interminable, and half of the Empire would not suffice to settle the lawsuits of the other half. I desire, therefore, that those who have recourse to the tribunals should be treated without any pity, and in such a manner that they shall be disgusted with law, and tremble to appear before a magistrate.

T. JERNIGAN, CHINA IN LAW AND COMMERCE 191 (1905).

For a contemporary view of mediation in China, which is carried out through local committees that "educate" the disputants toward compliance with the needs of socialist society, see Slaybod, *The Strange World of China's Lawyers*, BARRISTER, Winter 1980, at 10.

5. Cohen, *supra* note 2, at 1207.

This idea—that the natural and desirable condition is harmony—contrasts sharply with the predominant Western perspectives which focus on freedom as an absence of restraint and on autonomy and individual liberty as the highest goal.⁶ These Western notions, crystallized in the adversary system, pervade the American legal process and the lives of most of its citizens, including its lawyers. In recent years, though, mediation as a means of dispute processing has sent vines through the adversarial fence.⁷ They differ somewhat in purpose, orientation, and direction, but share a rapid growth rate. The development of mediation promises much that is good for American society and carries significant dangers as well.

This Article examines how we can make the most of mediation's promise while protecting against its dangers. Part I describes the status of mediation in this country. It argues that in order for our society to reap the benefits of mediation while containing its risks, many lawyers must come to understand mediation and a significant number must develop an ability and willingness to mediate a variety of matters that are currently pushed through the adversary mill. In Part II, I explain the forces working against proper involvement of lawyers in mediation and conclude that mediation education for lawyers and law students is essential to fostering such involvement. Part III describes forces pressing toward suitable involvement of lawyers in mediation. The Article concludes, in Part IV, somewhat speculatively, with some possible side effects of the growth of mediation education for lawyers in this country.

I. MEDIATION IN THE UNITED STATES

Ten years ago, most American lawyers would have associated mediation⁸ with international⁹ or labor relations disputes,¹⁰ and probably confused it with

6. See May, *Adversarialism in America*, CENTER MAGAZINE, Jan.-Feb. 1981, at 47, 48. See also D. YANKOLOVICH, *NEW RULES, SEARCHING FOR SELF-FULFILLMENT IN A WORLD TURNED UPSIDE DOWN* xviii (1980).

7. See text accompanying notes 16-41 *infra*.

8. In 1 D. HENDERSON, *CONCILIATION AND JAPANESE LAW* (1965), mediation is split into three categories: "Prestate or prelegal," which takes place between independent entities, such as nations, that are not mutually bound by a legal system; "didactic or proto-legal," in which the parties are educated or persuaded to do what the community requires of them (e.g., Tokugawa Japan, traditional and current China); and "voluntary," in which there is a practicable judicial option (e.g., Japan since 1951 and Norway). *Id.* at 4-5.

Sometimes conciliation is distinguished from mediation, with conciliation comprehending a go-between function designed to get or keep the parties talking, and mediation as a more active process on the part of the third party. D. MCGILLIS & J. MULLEN, *NEIGHBORHOOD JUSTICE CENTERS, AN ANALYSIS OF POTENTIAL MODELS* 10-11 (1977) [hereinafter cited as MCGILLIS & MULLEN]. No consistent usage has evolved, however. "Conciliation" in 1 D. HENDERSON, *supra*, includes what McGillis and Mullen would call "mediation." Other commentators use the terms interchangeably. Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95, 129 (1974); Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111, 115 n.14 (1976).

The kinds of "dispute processing" discussed in this Article include heavy third-party involvement. Accordingly, and because I find the term more inclusive, I will normally use "mediation."

9. See F. EDMOND, *ANALYSIS AND PREDICTION IN INTERNATIONAL MEDIATION* (1971); R. FISHER, *INTERNATIONAL MEDIATION: A WORKING GUIDE* (1978).

10. Government-provided mediation has long been an important method of resolving difficult labor-management disputes. The Federal Mediation and Conciliation Service (FMCS) has the duty "to assist parties to labor disputes in industries affecting commerce to settle such disputes through conciliation and mediation." 29

arbitration.¹¹ But in the last decade, mediation programs have proliferated at a breathtaking rate in this country.¹² Most of these efforts have been directed at what the American Bar Association has called "minor disputes"¹³—those involving "relatively small amounts of money or relatively pedestrian issues"¹⁴—and were designed to provide dispute processing services for cases that the standard adversary system cannot handle.¹⁵ Increasingly, however, mediation is finding application in disputes that normally are processed through the adversary system.

A. "Minor" Disputes

A large number of cities have neighborhood justice centers,¹⁶ in which volunteers¹⁷ from the community mediate (or arbitrate) interpersonal, neighborhood, domestic, consumer, landlord-tenant, or minor criminal disputes. Referrals come largely from prosecutors, police, or courts,¹⁸ though some neighborhood justice centers have a community orientation and rely more

U.S.C. § 173(a) (1976). And it "may proffer its services . . . whenever . . . such dispute threatens to cause a substantial interruption of commerce. . . ." *Id.* § 173(b). These services normally are used when there is a deadlock in collective bargaining. See generally W. SIMKIN, *MEDIATION AND THE DYNAMICS OF COLLECTIVE BARGAINING* 199-231 (1971). The FMCS may provide its services for grievance disputes also, but "only as a last resort and in exceptional cases." 29 U.S.C. § 173(d) (1976). Parties are obligated to "participate fully and promptly" in the sessions called by the FMCS. *Id.* § 174(a)(3). State and local agencies also are available in many parts of the country.

In public-sector labor-management disputes, mediation also is used heavily and provided by state, local, or federal agencies or private individuals. See W. SIMKIN, *supra*, at 331-54. In addition, many collective-bargaining agreements establish mediation as a means of processing grievances.

11. The confusion is persistent in conversations with lawyers and in the lay press. One reason is that both arbitration and mediation are seen as alternatives to processing disputes through the judicial system. Another is that mediation is wholly foreign to most lawyers' orientations. See text accompanying notes 90-118 *infra*.

12. See generally, Smith, *A Warmer Way of Disputing: Mediation and Conciliation*, 26 AM. J. COMP. L. 205 (Supp. 1978).

13. The American Bar Association sponsored a national conference on Minor Disputes Resolution in 1977. See ABA, *REPORT ON THE NATIONAL CONFERENCE ON MINOR DISPUTES RESOLUTION* (1977). The ABA subsequently established a Special Committee on the Resolution of Minor Disputes.

14. *Id.* at 1. Those involved in the ABA efforts at "minor" disputes resolution have long been displeased with the major-minor dichotomy, *id.*, and the ABA recently changed the name of its Special Committee on the Resolution of Minor Disputes to Special Committee on Alternative Means of Dispute Resolution. I employ the distinction because I suspect some members of the bar may oppose the spread of mediation to major disputes. See text accompanying notes 90-131 *infra*.

15. These may be viewed as parts of a broader movement to deal with weaknesses in the standard adversary system. See generally ABA, *REPORT ON THE NATIONAL CONFERENCE ON MINOR DISPUTES RESOLUTION*; Cratsley, *Community Courts: Offering Alternative Dispute Resolution Within the Judicial System*, 3 VT. L. REV. 1 (1978); Gest, *Settling Out of Court: Shortcut to Justice*, U.S. NEWS & W. REP., June 15, 1981, at 61; Granelli, *Got A Spat? Go Rent A Judge*, NAT'L L.J., June 8, 1981 at 1, col. 4; Granelli, *Other Non-courts of First Resort*, *id.* at 31, col. 1; *Dispute Resolution*, 88 YALE L.J. 905 (1979).

The Dispute Resolution Act of 1980, Pub. L. No. 96-190, 94 Stat. 17 (1980), authorizes financial assistance for fair and fast methods of minor dispute resolution and establishes a dispute resolution research center. No funds have been appropriated, however.

16. See ABA, *DISPUTE RESOLUTION DIRECTORY* (1981). These were patterned after experimental projects established by the U.S. Law Enforcement Assistance Administration in 1977. R. COOK, J. ROEHL, & D. SHEPPARD, *NEIGHBORHOOD JUSTICE CENTERS FIELD TEST 5-7* (1980) [hereinafter *FIELD TEST*]. For a description of the precursors of the Neighborhood Justice Centers, see MCGILLIS & MULLEN, *supra* note 8, at 25-30.

17. Often a small payment is provided. Mediators in the Houston Neighborhood Justice project are paid \$10.00 for an evening of mediation, which frequently lasts four hours.

18. *FIELD TEST*, *supra* note 16, at 24-29.

heavily on cases brought in by the disputants themselves.¹⁹ These programs have delivered speedy processing with a high level of satisfaction among the disputants.²⁰

Additional efforts have been limited to cases connected with a given court²¹ or prosecutor's office that sponsored the program.²² Still others have sought a "community-base" with a hope of dealing with broader problems²³ and sometimes using community leaders as mediators.²⁴ For a long time, various local ethnic groups have used mediation to deal with all manner of disputes among members,²⁵ and social pressure often assures compliance.²⁶

Mediation, sometimes combined with arbitration, also has been used lately in special programs established by individual businesses or by trade associations to handle consumer complaints.²⁷ Prisons, schools, and other institutions have joined the movement.²⁸

B. "Major" Disputes

New efforts at using mediation for dealing with "major" disputes of two principal types also have developed. The first includes conflicts, such as racial or environmental disputes, that concern many persons or interest groups in one locality.²⁹ The second is domestic relations—primarily divorce and child custody. Because family mediation is developing more rapidly, and because it involves lawyers heavily, it will receive substantial attention in this Article.

Some family mediation is governed by statute. A recent California law, for instance, provides for "mandatory mediation" of child custody issues in divorce cases before adversary processing.³⁰ But the bulk of divorce mediation, and the portion that is significant for purposes of this Article, is voluntary for both parties. The services are provided through conciliation

19. The experimental Venice/Mar Vista Neighborhood Justice Center project is an example. *Id.* at 37.

20. *Id.* at 87-91. *But cf.* Hofrichter, *Justice Centers Raise Basic Questions*, 2 NEW DIRECTIONS IN LEGAL SERVICES 168, 169-70 (1977) (highlighting the potential of centers for discouraging less powerful persons from attacking the root causes of their social and legal problems).

21. See Greason, *Humanists as Mediators: An Experiment in the Courts of Maine*, 66 A.B.A. J. 576 (1980); Snyder, *Crime and Community Mediation—The Boston Experience: A Preliminary Report on the Dorchester Urban Court Program*, 1978 WIS. L. REV. 737.

22. See FIELD TEST, *supra* note 16, at 5.

23. *Id.* at 5; Rifkin, d'Errico and Katsh, *Legal Studies and Mediation*, 32 NEW DIRECTIONS FOR HIGHER EDUC. 49 (1980).

24. Wahrhaftig, *A Time to Question Direction*, in PEOPLES' LAW REVIEW 212, 213-14 (R. Warner ed. 1980) (describing the Community Association for Mediation in Pittsburgh).

25. MCGILLIS & MULLEN, *supra* note 8, at 13-14; Doo, *Dispute Settlement in Chinese-American Communities*, 21 AM. J. COMP. L. 627 (1973).

26. MCGILLIS & MULLEN, *supra* note 8, at 14.

27. *Id.* at 12-13.

28. *Id.* at 14-15.

29. See Dibrell, *Mediation in Civil Rights Issues, the Port Arthur Experience*, THE POLICE CHIEF, Nov. 1976, at 80; Goldbeck, *Mediation: An Instrument of Citizen Involvement*, 30 ARB. J. 241 (1975); Straus, *Mediating Environmental Disputes*, 33 ARB. J. 5 (1978).

For an account of the work of a mediator for the Community Relations Service of the U.S. Department of Justice, see Dibrell, *supra*.

30. CAL. CIV. CODE § 4607 (West Supp. 1980). In addition, the Family Conciliation Court has jurisdiction over certain kinds of domestic disputes. *Id.* § 1760 (West Supp. 1981).

courts³¹ or organizations or by individuals, working alone or in teams, who may have professional training or credentials in disciplines such as psychotherapy or law.³² Preliminary reports suggest that these efforts often have been very successful in saving the disputants time and money,³³ providing a humane atmosphere, and producing terms that are more congruent with the parties' lives than those found in court decrees,³⁴ and which, therefore, are much more likely to be obeyed.³⁵

Mediation is especially useful in divorce cases because the strong emotional forces at work may call for more delicately wrought measures than could be provided in a court-imposed solution. But it is not for every divorcing couple. They must have a strong commitment and the emotional and intellectual abilities to cooperate, notwithstanding their difficulties, in dividing up property and developing a framework for governing their future relationship.³⁶ Each partner should be more interested in honoring the other's unique needs than hurting him. And they should be about equally powerful.

Mediation can help in other contexts in which the parties have a complex, interdependent relationship,³⁷ relative equality of bargaining power,³⁸ and strong incentives to work out their own relationship with minimal reliance upon others. These characteristics are often present in persons who seek lawyers' help in creating, operating, or dissolving organizations, contracts, or other relationships.³⁹ And when such characteristics are weak, they can be potentiated by an urge to save time and money⁴⁰ and avoid the possible nastiness and aggravating effects of adversary processing.⁴¹ Thus, many

31. H. IRVING, *DIVORCE MEDIATION* 46-49 (1980).

32. See O. COOGLER, *STRUCTURED MEDIATION IN DIVORCE SETTLEMENT* 75 (1978); Galante, *The One-Lawyer Divorce*, *Nat'l Law J.*, Jan 25, 1982, at 1, col. 1; Haynes, *Divorce Mediator: A New Role*, 23 *SOC. WORK* 5 (1978).

33. Bahr, *Mediation is the Answer*, *FAM. L. ADVOCATE*, Spring 1981, at 32.

34. *Id.*

35. Coogler, Weber and McKenry, *Divorce Mediation: A Means of Facilitating Divorce and Adjustment*, 28 *FAM. COORDINATOR* 255, 258 (1979).

36. Harris, *Divorce's Friendly Persuaders*, *MONEY*, April 1980, at 85. See generally Kressel, Jaffee, Tuchman, Watson and Deutsch, *A Typology of Divorcing Couples: Implications for Mediation and the Divorce Process*, 19 *FAM. PROCESS* 101 (1980).

37. See Fuller, *Mediation—Its Forms and Functions*, 44 *S. CAL. L. REV.* 305, 310 (1971). For a critical assessment of the assumption that disputants with "multiplex" ties will try to compromise their differences, because their goal will be maintenance of their relationship rather than winning, see Starr and Yngvesson, *Scarcity and Disputing: Zeroing-in on Compromise Decisions*, 2 *AM. ETHNOLOGIST* 553 (1975).

38. See Fuller, *supra* note 37, at 310, 314; Felstiner, *Influences of Social Organization on Dispute Processing*, 9 *L. & SOC'Y REV.* 63, 81 (1974).

39. See Fuller, *supra* note 37, at 309-12.

40. See *The Highest Legal Fees*, *NEWSWEEK*, Aug. 24, 1981, at 71. Consumer advocate Ralph Nader recently advised large corporations that were concerned with cutting legal fees to increase their use of mediation and out-of-court settlements as well as to beef up the responsibilities of in-house counsel. *Fat Fees*, *TIME*, July 27, 1981, at 68.

41. For a discussion of the nastiness and aggravating effects of the judicial adversary process, see M. FRANKEL, *PARTISAN JUSTICE* 62-63 (1978).

Mediation could have some use even if the parties are disputing mainly over an amount of money to be paid in damages for a personal injury claim arising out of an accident between strangers. *But cf.* Fuller, *supra* note 37, at 314 ("[M]ediation has scarcely any role to play in human relationships fluidly organized on . . . the market principle."). To the extent that the alleged malefactor's insurance carrier is the real party, the negotiation process might well be expedited through mediation. In addition, the injured person's antagonism toward the alleged malefactor is not fully discharged by the receipt of money from the insurance carrier. Mediation would give the parties a chance to rectify their relationship—which both may need.

persons who now use an adversarial lawyer to handle their disputes could benefit enormously if they also could take advantage of appropriate mediation services. Savings to society in the form of reduced court costs would follow as well.

C. Mediation and the Law

Mediation offers some clear advantages over adversary processing: it is cheaper, faster, and potentially more hospitable to unique solutions that take more fully into account nonmaterial interests of the disputants.⁴² It can educate the parties about each other's needs and those of their community.⁴³ Thus, it can help them learn to work together and to see that through cooperation both can make positive gains.⁴⁴ One reason for these advantages is that mediation is less hemmed-in by rules of procedure or substantive law and certain assumptions that dominate the adversary process. There are, of course, assumptions that affect the procedure and results achieved in mediations—assumptions about mutuality, cooperation, and fairness,⁴⁵ and general principles that ought to govern; in some systems, rules that approximate applicable law even serve as starting points.⁴⁶ But in mediation—as distinguished from adjudication and, usually, arbitration—the ultimate authority resides with the disputants. The conflict is seen as unique and therefore less subject to solution by application of some general principle.⁴⁷ The case is neither to be governed by a precedent nor to set one.⁴⁸ Thus, all sorts of facts, needs, and interests that would be excluded from consideration in an adversary, rule-oriented proceeding could become relevant in a mediation. Indeed, whatever a party deems relevant is relevant.⁴⁹ In a divorce mediation, for instance, a spouse's continuing need for emotional support could become important, as could the other party's willingness and ability to give it. In most mediations, the emphasis is not on determining rights or interests, or who is right and who is wrong, or who wins and who loses because of which rule; these would control the typical adjudicatory proceeding. The focus, instead, is upon establishing a degree of harmony through a resolution that will work for these disputants.⁵⁰

A danger inheres in this alegal character: individuals who are not aware of their legal position are not encouraged by the process to develop a rights-

42. See J. HAYNES, *DIVORCE MEDIATION* 10-11 (1981); Northrop, *supra* note 4, at 350-51.

43. Cohen, *supra* note 2, at 1224-25; Goldbeck, *supra* note 29, at 245-46.

44. J. HAYNES, *supra* note 42, at 5.

Of course, if only money or property is at stake, it may not be possible for both to gain from mediation except to the extent that litigation costs are avoided. That is why mediation most often is employed if parties have complex relationships. See note 40 *supra*.

45. See generally, Friedman, *Mediation: Reducing Dependence on Lawyers and Courts to Achieve Justice*, in *PEOPLES' LAW REVIEW* 42 *passim* (R. Warner ed. 1981).

46. See O. COOGLER, *supra* note 32, at 13-22; note 59 *infra*.

47. See Marasinghe, *supra* note 2, at 400-03; Northrop, *supra* note 4, at 356.

48. See Northrop, *supra* note 4, at 353.

49. See Marasinghe, *supra* note 2, at 395-96, 401.

50. See Fuller, *supra* note 37, at 326; Marasinghe, *supra* note 2, at 403.

consciousness or to establish legal rights.⁵¹ Thus, the risk of dominance by the stronger or more knowledgeable party is great.⁵² Accordingly, for society to maximize the benefits of mediation while controlling its dangers, it must carefully adjust the role of lawyers in the mediation process.

Though mediation agreements typically neither set nor follow legal precedent, they often have important legal consequences. Frequently, the mere making of an agreement defers legal action by one of the disputants or the government. The agreement itself may establish or avoid legally enforceable rights. To reduce the danger that less powerful persons unwittingly will give up legal rights that would be important to them, they must be afforded a way of knowing about the nature of the adversary process and the result it would likely produce. But the very presentation of the rules that would probably govern a decision if the matter were litigated may impel parties toward adopting the predicted results, rather than regarding the law as simply one factor—to be blended with a variety of economic, personal, and social considerations—in reaching a decision. At the same time, if such information is not readily available to them, they are not necessarily free from influence by the law; they may be basing their decisions to mediate and their judgments during mediation upon inaccurate assumptions about what result would follow from adversary processing.⁵³

D. *The Role of the Mediator*

Nearly all mediators seek to help the disputants achieve an agreement. Most have educational objectives as well, especially where the parties will have a continuing relationship. There are, however, enormous differences in procedures and in roles that mediators adopt. Some will act merely as go-betweens, keeping open lines of communication. They may or may not give their own suggestions when the parties have deadlocked. Some mediators will separate the parties physically; others will insist on keeping them together. Some mediators will urge that the parties propose solutions; others will make

51. See 1 D. HENDERSON, *supra* note 2, at 9–10; Cohen, *supra* note 2, at 1207–08, 1215; Marasinghe, *supra* note 2, at 407; Ohta and Hozumi, *Compromise In The Course of Litigation*, 6 LAW IN JAPAN 97, 109 (1973); Hahm, *The Decision Process In Korea*, in COMPARATIVE JUDICIAL BEHAVIOR 19–21 (G. Schubert & D. Danielski eds. 1969).

52. This is a special danger when mediation is being used to support the established order. See Cohen, *supra* note 2, at 1208; Hofrichter, *supra* note 20, at 169–70.

Obviously, the judicial process, as it functions in this country, is vulnerable to the same criticism. Howard Zinn gives an extreme view:

The "rule of law" in modern society is no less authoritarian than the rule of men in pre-modern society; it enforces the maldistribution of wealth and power as of old, but it does this in such complicated and indirect ways as to leave the observer bewildered. . . . In slavery, the feudal order, the colonial system, deception and patronization are the minor modes of control; force is the major one. In the modern world of liberal capitalism (and also, we should note, of state socialism), force is held in reserve while . . . "a multitude of moral teachers, counselors, and bewilders separate the exploited from those in power." In this multitude, the books of law are among the most formidable bewilders.

Zinn, *The Conspiracy of Law*, in THE RULE OF LAW 18–19 (R. Wolff ed. 1971).

53. I am aware of the dangers of inaccurate predictions by lawyers.

their own proposals and try to persuade the parties to accept them and may even apply economic, social, or moral pressure to achieve a "voluntary" agreement.⁵⁴

One of the principal functions of the mediator is managing the communications process. He must intervene carefully at the correct moments. Accordingly, he must understand interpersonal relations and negotiations.⁵⁵ He must be able to listen well and perceive the underlying emotional, psychological, and value orientations that may hold the keys to resolving more quantifiable issues.⁵⁶ And he must arrange for these to be honored in the mediation process, the agreement, and the resulting relationship.⁵⁷ A like sensitivity is essential for good lawyering as well, but it occupies a more prominent place on the list of skills required of a mediator.

E. *The Role of the Lawyer in Mediation*

Nearly all mediation efforts distinguish between the functions of the lawyer and those of the mediator, even where the mediator is a lawyer. In the Houston Neighborhood Justice Center project, for instance, the involvement of lawyers is not encouraged. People wishing or needing legal advice are referred to lawyers who are not connected with the Center. Though about one out of seven of the mediators, all of whom have completed a forty hour training program, is a lawyer, each is enjoined not to give legal advice, and they generally do not let disputants know that they are lawyers. Lawyers are not to think or act like lawyers when they are mediating. All mediators, lawyers or not, draw up resulting agreements, which the parties sign. The emphasis is on simple language, not precise drafting.

Not infrequently, a mediation will be concerned with one part, say harassment, of a larger problem, such as divorce, for which the parties have legal representation. In these and other cases in which the parties have counsel, the lawyers are allowed but not encouraged to attend the mediation sessions.

In family mediation, on the other hand, the involvement of a lawyer is recognized as essential and has developed in several different ways. The lawyer may be an "impartial" advisor to both parties, a legal advisor to one

54. Cohen, *supra* note 2, at 1201. See P. GULLIVER, *supra* note 1, at 219-28; see also text accompanying note 26 *supra*.

55. Gulliver cautions against the assumption that the mediator is neutral. In some systems it is permissible for the mediator to be partial to one side. Sometimes the mediator will have the interests of a dominant class or individual or of the community at heart. Moreover, the mediator may gain prestige by securing an agreement. P. GULLIVER, *supra* note 1, at 213-16.

56. P. GULLIVER, *supra* note 1, at 219-20.

56. See Steinberg, *Towards an Interdisciplinary Commitment: A Divorce Lawyer Proposes Attorney-Therapist Marriages or, at the Least, an Affair*, J. MARITAL & FAM. THERAPY, July 1980, at 259, 264. Some have taken the view that mediation is similar to group psychotherapy and that, accordingly, a mediator needs the skills of a group therapist. Knowles, *Mediation and the Psychology of Small Groups*, 9 LAB. L.J. 780, 782-83 (1958); cf. Smith, *supra* note 12, at 208 (mediation provides a form of therapy or catharsis).

57. See Pickrell and Bendheim, *Family Disputes Mediation—A New Service for Lawyers and Their Clients*, BARRISTER, Winter 1980, at 27-28.

party, or a member of an interdisciplinary team. In addition, he may function explicitly as a mediator.

In *Structured Mediation in Divorce Settlement*—a system conceived by lawyer O. J. Coogler⁵⁸ and propagated through training programs conducted by the Family Mediation Association—a set of rules, patterned after the Uniform Marriage and Divorce Act, is used as a starting point in deciding issues of property division, alimony, and child support and custody.⁵⁹ An advisory attorney is drawn from a panel to answer legal questions and prepare documents.⁶⁰ Under the original plan, lawyers were not to work as mediators since they were “not as well equipped [to handle problems involving interpersonal conflict], because of their lack of training in behavioral sciences, as well as ethical restrictions under which they must practice.”⁶¹ In fact, Family Mediation Association training now is available to lawyers, but the lawyer and mediator functions remain distinct.⁶²

In other settings, each member of the couple in divorce mediation will have his or her own lawyer before or during the mediation;⁶³ some mediators in these situations prefer to draft the agreement and then urge each party to secure independent legal review.⁶⁴ Finally, some lawyers work as a team with a psychotherapist who functions as a mediator.⁶⁵

A lawyer may function explicitly as a divorce mediator, also. He may do so by representing one of the spouses, leaving the other unrepresented; both of the spouses; or neither of the spouses.

Each of these models has strengths and weaknesses.

Parties who have independent counsel can benefit from an adversarial look at their position. A prediction of the likely results of adversary processing is necessary for an informed, fully voluntary decision about a mediated solution. Sometimes lawyers also aid the mediation process by urging their clients to accept a reasonable compromise. There is a concomitant likelihood, however, that a lawyer's advice will work to undermine a mediation. Of course, this occasionally will be in the client's best interest. But some lawyers—for a

58. O. COOGLER, *supra* note 32, at 13–22.

59. *Id.* Although Coogler states that clients should have “the greatest autonomy in reaching settlement,” *id.* at 26, the system contemplates adherence to norms not necessarily created by, nor attuned to, the interests of the parties. For instance, he indicates that the mediator should refuse to concur in an agreement “which is manifestly not in keeping with the ethical and legal responsibilities of the parties—if, for example, a mother agrees to assume full responsibility for the support of the children despite the father's ability to contribute to their support.” *Id.* at 26–27.

60. *Id.* at 25–26.

61. *Id.* at 85.

62. *Training Programs*, FAM. MEDIATOR, Nov. 1981, at 4.

63. *See, e.g.*, Pickrell and Bendheim, *supra* note 57, at 28.

64. Haynes, *supra* note 32, at 84.

65. *See* Silberman, *Professional Responsibility Problems of Divorce Mediation*, 7 Fam. L. Rep. (BNA) 4001, 4005, 4010 n.51 (1981).

variety of reasons discussed below⁶⁶—may tend to deliver advice in a way that exaggerates the importance of the adversary perspective and the accuracy of their predictions. When this occurs, the client may be drawn away inappropriately from a mediated resolution. But the risk of inappropriate disruption by outside lawyers also is directly related to the level of the parties' commitment to nonadversarial processing. A person who truly wanted to resolve his problem in a nonadversarial, personal fashion—if he is satisfied with the results of mediation—would not be inclined to give high value to the possible advantages proffered by the adversary lawyer.

One way to lessen the likelihood of a lawyer's undermining a mediation is to employ an impartial attorney to advise both parties, but this raises a number of worries. There are, as examples, mild possibilities of charges of aiding in the unauthorized practice of law (a violation of DR 3-101(A)) or practicing law in association with or otherwise sharing fees with a layman (a violation of DR 3-102(A)).⁶⁷ The most substantial concern, however, is the enormous difficulty of giving impartial or neutral legal advice if the parties have conflicting interests. This raises the spectre of breaching the requirement of Canon 5 that a lawyer exercise independent professional judgment on behalf of a client. A recent opinion imposed, *inter alia*, the conditions that "the issues not be of such complexity that the parties cannot prudently reach resolution of the controversy without the advice of separate and independent legal counsel," and that the lawyer advise the parties of the limitations and risks of his role and of the advantages of independent legal counsel, obtain their informed consent, give legal advice only in the presence of both, and refrain from representing either in a subsequent proceeding concerning divorce.⁶⁸ If one lawyer advises the couple, each partner is deprived of the benefit of an adversarial look at his or her situation.

The interdisciplinary approach seems to offer enormous promise. It can attend at once to legal, emotional, value, and relational needs. Each of the professionals can learn from the other and broaden his own view of the situation. The problems, though, seem just as great as those presented to the lawyer-mediator alone. Here again, the *Code of Professional Responsibility* may present obstacles: the Canon 5 injunction to exercise independent professional judgment; the Canon 3 mandate to assist in preventing the unauthorized practice of law; and the DR 3-102(A) prohibition of practicing law or sharing fees with a layman.⁶⁹ But practical difficulties seem even weightier. Anyone who has tried it knows that interdisciplinary work is difficult. Lawyers and therapists look at the world differently. In addition, the team approach presents

66. See text accompanying notes 90-131 *infra*.

67. Maryland State Bar Assoc., Opinions, No. 80-55A (Aug. 20, 1980) at 2; Silberman, *supra* note 65, at 4007-08; MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 3-101(A) & 3-102(A).

68. New York City Bar Assoc., Opinions, No. 80-23 in 7 Fam. L. Rep. [BNA] 3097, 3099-100 (1981).

69. Silberman, *supra* note 65, at 4006. For a discussion of several bar association ethics opinions on this issue, which took positions ranging from barring attorneys from this activity to cautioning them, see *id.* at 4007-09.

problems of control, responsibility, and jurisdiction that will severely tax the talents and personalities of those who try it. The lawyer-therapist/mediator team can work very well, but only rarely will an adequate match-up of professionals occur.

When a lawyer functions explicitly as a mediator while representing both of the parties, or just one of the parties while leaving the other unrepresented, the principal professional responsibility concern is again the Canon 5 requirement that a lawyer exercise independent professional judgment on behalf of a client.⁷⁰ Bar associations have traditionally prohibited dual representation in matrimonial cases,⁷¹ but have recently shown some signs of liberalization. The Ohio state bar ethics committee recently permitted a lawyer to draft a separation agreement for a couple so long as he was representing one of the parties and the other was protected by giving a knowing consent.⁷² The Arizona committee also has permitted dual representation,⁷³ as has a California appellate court in limited circumstances, including full disclosure of risks.⁷⁴

The *Model Code of Professional Responsibility*, EC 5-20, permits a lawyer to mediate in a matter that involves "present or former clients . . . if he first discloses such . . . relationships . . . and [does not] thereafter represent in the dispute any of the parties involved."⁷⁵ The Wisconsin bar ethics committee has ruled that a lawyer who educated the parties about their legal rights and responsibilities, mediated disputes during the negotiations, drafted documents, and appeared in court would find himself beyond the protection of EC 5-20, even though each party would receive independent legal review of the agreement and the lawyer would not represent either party subsequently.⁷⁶ And, of course, there are significant risks of a malpractice action.⁷⁷

The principal danger of dual representation is that one of the parties will take unfair advantage of the other, knowingly or not. With this in mind, Rule 2.2 of the proposed final draft of the American Bar Association *Model Rules of Professional Conduct*, which would apply where a lawyer represents both parties, provides that:

(a) A lawyer may act as intermediary between clients if:

(1) The lawyer discloses to each client the implications of the common representation, including the advantages and risks involved, and obtains each client's consent to the common representation;

(2) The lawyer reasonably believes that the matter can be resolved on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interest of any of the clients if the contemplated resolution is unsuccessful; and

70. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 5.

71. Silberman, *supra* note 65, at 4001.

72. Ohio State Bar Assoc., Opinions, No. 30 (1975).

73. Arizona State Bar Assoc., Opinions, No. 76-25 (November 25, 1976).

74. Klemm v. Superior Court of Fresno County, 75 Cal. App. 3d 893, 142 Cal. Rptr. 509 (1977).

75. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-20.

76. Wisconsin Bar Assoc., Opinions, No. E-79-2 (1980).

77. See Lange v. Marshall, 622 S.W.2d 237 (Mo. App. 1981).

(3) The lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.

(b) While acting as intermediary, the lawyer shall explain fully to each client the decisions to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.

(c) A lawyer shall withdraw as intermediary if any of the clients so requests, if the conditions stated in paragraph (a) cannot be met or if in the light of subsequent events the lawyer reasonably should know that a mutually advantageous resolution cannot be achieved. Upon withdrawal, the lawyer shall not continue to represent any of the clients unless doing so is clearly compatible with the lawyer's responsibilities to the other client or clients.⁷⁸

This model offers significant potential advantages to clients who wish to save time and money and avoid an adversarial confrontation. Yet when assets or interests that the parties consider significant are involved, they will usually want the benefit of a partisan look at their case.⁷⁹

The most recent development—the lawyer serving as divorce mediator but not representing either party—has earned the qualified approval of the Boston and Oregon bar ethics committees.⁸⁰ The Oregon opinion imposed the conditions that the attorney

1. . . . must clearly inform the parties he represents neither of them and they both must consent to this arrangement;
2. . . . may give legal advice only to both parties in the presence of each other;
3. . . . may draft the proposed agreement but he must advise, and encourage, the parties to seek independent legal counsel before execution of the agreement; and
4. . . . must not represent either or both of the parties in the subsequent legal proceedings.⁸¹

This model seems to offer the best possibilities for the appropriate use of law and lawyers in mediation of some matters that normally pass through the adversary process. The attorney-mediator can attempt to provide impartial legal information while making clear the risks to the clients in his doing so. The outside consultations with lawyers can defend against the possibility of bias (deliberate or not) in the lawyer-mediator's work and reduce the chances that one party will inappropriately exercise power over the other.

Another advantage is that information about what a court would do can be integrated into the mediation process in a way that suits the needs of the parties. Because he is an expert on law, the lawyer-mediator can help the parties free themselves, when appropriate, from the influence of legal norms

78. ABA COMMISSION ON EVALUATION OF PROFESSIONAL STANDARDS, PROPOSED FINAL DRAFT—MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.2 (1981).

79. See text accompanying note 86 *infra*.

80. Boston Bar Assoc., Opinions, No. 78-1 (1978); Oregon Bar Assoc., Opinions, No. 79-46 (Proposed 1980). The Oregon opinion was subsequently tabled pending an inquiry of an attorney using a trade name in his or her divorce mediation practice. Letter from General Counsel George Reimer to author (Jan. 14, 1982).

81. Oregon Bar Assoc., Opinions, No. 79-46 (proposed 1980).

so that they can reach for a solution that is appropriate to them.⁸² In addition, the experienced lawyer who functions as a mediator can offer a variety of business arrangements to accomplish the objectives of the parties. These options can become part and parcel of the decision process, and the law-trained mediator who is present at all the sessions and thoroughly familiar with the various needs of the parties can propose alternatives finely tuned to such needs. Moreover, the lawyer-mediator can, better than the lay mediator, identify a myriad of legal issues that must be addressed in the final agreement, and press the disputants to reach decisions. He can incorporate the results in a draft final agreement, which—because of the lawyer-mediator's skill in identifying issues and preparing documents—would be less vulnerable to upending by the outside lawyers than would one drafted by a nonlawyer.⁸³

F. *The Future of Mediation*

The future of mediation in this country rests heavily upon the attitudes and involvement of the legal profession. If society is to use mediation to its fullest advantage—properly employing it in minor disputes and extending its application to more major ones—and protect against the dangers of its alegal character, lawyers must be involved, but carefully. My contention is that two developments are required if mediation is to be used well. The first is that many lawyers must come to understand mediation and when it can be useful. The second is that a significant number of lawyers must begin serving explicitly as mediators, in ways that also employ their legal skills.⁸⁴

Unless a lawyer is familiar with mediation and when it can be useful, he will not be inclined to recommend it to his clients. Moreover, his orientation may undermine a mediation process in which his client is involved. A lawyer serving as an outside attorney to one of the parties or as an impartial advisory attorney can help the process along only if he understands it. Lawyers and judges play important roles in governing some minor disputes and community mediation programs. Unless they, too, grasp mediation's potential, they may be inclined to see these programs solely as ways of maintaining the *status quo*—by processing poor people's disputes so as to relieve court congestion

82. Lon Fuller wrote that a proper function of a mediator was to help parties "to free themselves from the encumbrance of rules and [to accept], instead, a relationship of mutual respect, trust, and understanding that will enable them to meet shared contingencies without the aid of formal prescriptions laid down in advance." Fuller, *supra* note 37, at 325-26.

83. Some of the ideas in this paragraph were derived from two days of observing divorce mediations conducted by Gary Friedman in his Mill Valley, California, law office and discussing these with him.

Plainly, some non-lawyer mediators could become sufficiently knowledgeable about law and business arrangements so that the agreements they produced would not be especially vulnerable to attack. One such mediator states that none of the agreements he drafted was ever rejected by a lawyer, though they often suggested "minor changes." Haynes, *supra* note 42, at 144.

Nonlawyer mediators run some risk of engaging in the unauthorized practice of law. Silberman, *supra* note 65, at 4003-04.

84. For a discussion of how Sri Lankan lawyers resisted the conciliation boards that disputants were required to use before they litigated, and from which lawyers were excluded, see Marasinghe, *supra* note 2, at 405-08.

and reduce violence in the community. The danger is that this perspective could emphasize speed over quality in mediation and might therefore exclude the possibilities that mediation holds for helping people take charge of their own lives instead of expecting elites—whether government or business, physicians or lawyers—to satisfy their needs.⁸⁵ Each of these threats could be softened if more lawyers understood mediation.

But an expansion of lawyers' knowledge about mediation is not enough. Increased use of mediation in many cases currently processed through the adversary system will develop only if substantial numbers of lawyers begin to function *explicitly* as mediators. Our society and most individuals in it are oriented toward individual rights and interests⁸⁶ and consider—correctly, for the most part—that lawyers are their only source of help in achieving, perfecting, or protecting such rights. Accordingly, most people involved in disputes that currently are handled through the adversary process will, even if they are interested in non-adversarial processing, probably continue to consult lawyers initially. Knowledge of their legal position often will be vital to the decision whether to use mediation. Thus, for most people, lawyers will remain the initial consultants in dispute processing, and for most of these clients, the lawyers will take a significant degree of control over how the dispute is handled.

Plainly, many lawyers who do not mediate, if adequately informed about mediation, would be inclined to make appropriate referrals, especially if they could retain some control over the strictly legal work. But there also are strong currents pushing against such referrals. Professionals tend to do what they know how to do, and they suppose that what they do is to their client's advantage. Most lawyers (and clients) "assume that if two people can't come to an agreement, the next stage is for [them] to enter into negotiations with their lawyer."⁸⁷ Even the lawyer who does recognize the suitability of mediation—consciously or unconsciously—would be subject to powerful forces that would press against referral of the case, or any part of it, to mediation. First, if the mediator is not a lawyer, there are possible professional responsibility problems,⁸⁸ as well as the strong feeling that certain kinds of disputes should be handled only by lawyers and that a lay mediator could not adequately facilitate decisions on a variety of technical issues.⁸⁹ Second, the fear exists that even the suggestion of such referral would destroy the client's trust by shattering his expectations that the lawyer would serve as his eager champion. Third, referral to mediation would cost the lawyer all or part of his fees. And even if he referred only part of the matter—say the custody decision in a divorce case—he would lose a significant element of control.

85. See Fuller, *supra* note 37, at 315.

86. See note 6 *supra* and note 111 *infra* and accompanying text.

87. Friedman, *Mediation: A Good Way to Resolve Some Cases Some of the Time*, 11 CAL. TRIAL LAW. J. 117, 117 (1981).

88. See text accompanying notes 67-81 *supra*.

89. See Rich, *The Role of Lawyers: Beyond Advocacy*, 1980 B.Y.U. L. REV. 767, 775.

For similar reasons, the lawyer who did not mediate would not be inclined to engage in preventive lawyering approaches that would move his client toward mediated solutions to disputes that might arise in the future—such as inserting a clause in a commercial agreement to provide that disputes under it would be mediated.

But if a cadre of lawyers who were willing and able to serve as mediators were to develop, clients and cases that were suitable for mediation would have a better chance of getting access to mediation. Some cases would be mediated because the disputants would choose a lawyer-mediator, others because the clients chanced upon a lawyer who mediated. Still others would be referred to mediation by lawyers who felt confident in the combination of legal and mediative skills possessed by the law-trained mediator and knew they could retain something like their traditional lawyer's role.

II. HEADWINDS: PRESSURES AGAINST LAWYERS' PROPER INVOLVEMENT IN MEDIATION

Most lawyers neither understand nor perform mediation nor have a strong interest in doing either. At least three interrelated reasons account for this: the way most lawyers, as lawyers, look at the world; the economics and structure of contemporary law practice; and the lack of training in mediation for lawyers.

A. *The Lawyer's Standard Philosophical Map*

E. F. Schumacher begins his *Guide for the Perplexed* with the following story:

On a visit to Leningrad some years ago, I consulted a map . . . but I could not make it out. From where I stood, I could see several enormous churches, yet there was no trace of them on my map. When finally an interpreter came to help me, he said: "We don't show churches on our maps." Contradicting him, I pointed to one that was very clearly marked. "That is a museum," he said, "not what we call a 'living church.' It is only the 'living churches' we don't show."

It then occurred to me that this was not the first time I had been given a map which failed to show many things I could see right in front of my eyes. All through school and university I had been given maps of life and knowledge on which there was hardly a trace of many of the things that I most cared about and that seemed to me to be of the greatest possible importance to the conduct of my life.⁹⁰

The philosophical map employed by most practicing lawyers and law teachers, and displayed to the law student—which I will call the lawyer's standard philosophical map—differs radically from that which a mediator must use.⁹¹ What appears on this map is determined largely by the power of

90. E. SCHUMACHER, A GUIDE FOR THE PERPLEXED 1 (1977). For a sociology of knowledge perspective on why we notice what we notice, see P. BERGER & T. LUCKMANN, THE SOCIAL CONSTRUCTION OF REALITY (1966).

91. The extreme version of the map that I paint here also is inadequate for a good lawyer. See text accompanying notes 105-06 *infra*.

two assumptions about matters that lawyers handle: (1) that disputants are adversaries—*i.e.*, if one wins, the others must lose⁹²—and (2) that disputes may be resolved through application, by a third party, of some general rule of law.⁹³ These assumptions, plainly, are polar opposites of those which underlie mediation: (1) that all parties can benefit through a creative solution to which each agrees;⁹⁴ and (2) that the situation is unique and therefore not to be governed by any general principle except to the extent that the parties accept it.⁹⁵

The two assumptions of the lawyer's philosophical map (adversariness of parties and rule-solubility of dispute), along with the real demands of the adversary system and the expectations of many clients, tend to exclude mediation from most lawyers' repertoires. They also blind lawyers to other kinds of information that are essential for a mediator to see, primarily by riveting the lawyers' attention upon things that they must see in order to carry out their functions. The mediator must, for instance, be aware of the many interconnections between and among disputants and others, and of the qualities of these connections; he must be sensitive to emotional needs of all parties and recognize the importance of yearnings for mutual respect, equality, security, and other such non-material interests as may be present.⁹⁶

On the lawyer's standard philosophical map, however, the client's situation is seen atomistically; many links are not printed. The duty to represent the client zealously within the bounds of the law discourages concern with both the opponents' situation and the overall social effect of a given result.⁹⁷

Moreover, on the lawyer's standard philosophical map, quantities are bright and large while qualities appear dimly or not at all.⁹⁸ When one party wins, in this vision, usually the other party loses, and, most often, the victory is reduced to a money judgment. This "reduction" of nonmaterial values—such as honor, respect, dignity, security, and love—to amounts of money, can have one of two effects. In some cases, these values are excluded from the decision makers' considerations, and thus from the consciousness of the

92. See Fuller, *supra* note 37, at 316.

93. See S. SCHEINGOLD, *THE POLITICS OF RIGHTS* 151–52, 156 (1974). See generally J. SHKLAR, *LEGALISM* (1964).

94. See notes 40 and 44, and accompanying text *supra*.

95. Mediations do typically operate under general assumptions such as fairness, mutuality of obligation, and cooperation. See text accompanying note 45 *supra*.

96. See text accompanying notes 55–57 *supra*.

97. See M. KELLY, *LEGAL ETHICS AND LEGAL EDUCATION* 40–41 (1980); S. SCHEINGOLD, *supra* note 93, at 153, 165.

98. Huston Smith contrasts the modern, secular, and scientific view with the traditional, humanistic and religious. "The gist of their differences is that modernity, spawned essentially by modern science, stresses quantity (in order to get at power and control) whereas tradition stresses quality (and the participation that is control's alternative)." Smith, *Excluded Knowledge: A Critique of the Modern Western Mind Set*, 80 *TEACHERS COLLEGE RECORD* 419, 421–22 (1979). Thus, the modern vision leaves out "most of the things that mankind has considered important throughout its history," including "intrinsic and normative values"; "purposes"; "global and existential meanings"; and "quality." *Id.* at 423–24.

The modern view clearly helps the lawyer gain and exercise power and control, and it excludes much that is important, especially for a mediator.

lawyers, as irrelevant. In others, they are present but transmuted into something else—a justification for money damages. Much like the church that was allowed to appear on the map of Leningrad only because it was a museum, these interests—which may in fact be the principal motivations for a lawsuit—are recognizable in the legal dispute primarily to the extent that they have monetary value or fit into a clause of a rule governing liability.

The rule orientation also determines what appears on the map. The lawyer's standard world view is based upon a cognitive and rational outlook.⁹⁹ Lawyers are trained to put people and events into categories that are legally meaningful, to think in terms of rights and duties established by rules,¹⁰⁰ to focus on acts more than persons. This view requires a strong development of cognitive capabilities, which is often attended by the under-cultivation of emotional faculties.¹⁰¹ This combination of capacities joins with the practice of either reducing most nonmaterial values to amounts of money or sweeping them under the carpet, to restrict many lawyers' abilities to recognize the value of mediation¹⁰² or to serve as mediators.

The lawyer's standard philosophical map is useful primarily where the assumptions upon which it is based—adversariness and amenability to solution by a general rule imposed by a third party—are valid. But when mediation is appropriate, these assumptions do not fit. The problem is that many lawyers, because of their philosophical maps, tend to suppose that these assumptions are germane in nearly any situation that they confront as lawyers. The map, and the litigation paradigm on which it is based, has a power all out of proportion to its utility. Many lawyers, therefore, tend not to recognize mediation as a viable means of reaching a solution; and worse, they see the kinds of unique solutions that mediation can produce as threatening to the best interests of their clients.

"One of the central difficulties of our legal system," says John Ayer, "is its capacity to be deaf to the counsel of ordinary good sense."¹⁰³ A law school

99. See Redmount, *The Transactional Emphasis in Legal Education*, 26 J. LEGAL ED. 253, 255 (1974); M. KELLY, *supra* note 97, at 46.

100. S. SCHEINGOLD, *supra* note 93, at 159.

101. See Redmount, *supra* note 99, at 256, 258-59; Kennedy, *How the Law School Fails: A Polemic*, 1 YALE REV. L. & SOC. ACTION 71 (Spring 1970); Savoy, *Toward a New Politics of Legal Education*, 79 YALE L.J. 444, 444 n.4 (1970). But cf. Stone, *Legal Education on the Couch*, 85 HARV. L. REV. 392, 422-23 (1971) (criticizing Kennedy and Savoy for supposing that the process of separating thought from feeling is unique to legal education).

For a discussion of several studies that suggest empathy declines during graduate training in psychology, see I. D. HOGAN, *THE REGULATION OF PSYCHOTHERAPISTS* 146 (1979).

102. Scheingold has argued that the narrow, legalistic world view embraced by activist lawyers makes them likely to think of their capacity for public service entirely in terms of legal skills. Their skills are, at once, a source of expertise and the boundary line of legitimate professional behavior. . . .

. . . .
 . . . Most simply put, lawyers are led to think of their services as a product which is sold rather than a vital public necessity. Attention is focused on those services that pay rather than on the societal job that has to be done.

S. SCHEINGOLD, *supra* note 93, at 166-67 (emphasis added).

103. Ayer, *Isn't There Enough Reality To Go Around? An Essay On The Unspoken Promises of Our Law*, 53 N.Y.U. L. REV. 475, 489-90 (1978).

classroom incident shows how quickly this deafness afflicts students—usually without anyones noticing. Professor Kenney Hegland writes:

In my first year Contracts class, I wished to review various doctrines we had recently studied. I put the following:

In a long term installment contract, Seller promises Buyer to deliver widgets at the rate of 1000 a month. The first two deliveries are perfect. However, in the third month Seller delivers only 999 widgets. Buyer becomes so incensed with this that he rejects the delivery, cancels the remaining deliveries and refuses to pay for the widgets already delivered. After stating the problem, I asked "If you were Seller, what would you say?" What I was looking for was a discussion of the various common law theories which would force the buyer to pay for the widgets delivered and those which would throw buyer into breach for cancelling the remaining deliveries. In short, I wanted the class to come up with the legal doctrines which would allow Seller to crush Buyer.

After asking the question, I looked around the room for a volunteer. As is so often the case with the first year students, I found that they were all either writing in their notebooks or inspecting their shoes. There was, however, one eager face, that of an eight year old son of one of my students. It seems that he was suffering through Contracts due to his mother's sin of failing to find a sitter. Suddenly he raised his hand. Such behavior, even from an eight year old, must be rewarded.

"OK," I said, "What would you say if you were the seller?"

"I'd say 'I'm sorry'."¹⁰⁴

I do not mean to imply that all lawyers see only what is displayed on the lawyer's standard philosophical map. The chart I have drawn exaggerates certain tendencies in the way many lawyers think. Any good lawyer will be alert to a range of nonmaterial values, emotional considerations, and interconnections.¹⁰⁵ Many lawyers have "empathic, conciliatory" personalities that may incline them to work often in a mediative way.¹⁰⁶ And other lawyers, though they may be more competitive, would recognize the value of mediation to their clients. I do submit, however, that most lawyers, most of the time, use this chart to navigate.

104. Hegland, *Why Teach Trial Advocacy? An Essay on Never Ask Why*, in HUMANISTIC EDUCATION IN LAW, Monograph III, at 68-69 (1982).

A similar event brightened an early session of my first year torts class when we were discussing *Garratt v. Dailey*, 46 Wash. 2d 197, 297 P.2d 1091 (1955), in which a woman brought a battery action against a 5 year old boy who allegedly had pulled a chair out from under her as she was sitting down. After it became clear that the child's parents would not be liable, we discussed why—in a case such as this one—an adult would bring an action against a child (unless, of course, the child had assets). It became clear that Mrs. Garratt probably wanted something other than money. I asked whether there would have been some way for the defendant's lawyer to have disposed of the case quickly. Several students suggested an out-of-court settlement or a written agreement about keeping young Brian Dailey away from Naomi Garratt. Then I asked what kind of advice they would have given the Dailey family as a friend, before they had gone to law school. Instantly, someone suggested an apology.

105. See M. KELLY, *supra* note 97, at 46. Typically, the lawyer's range of awareness is much narrower than that required of a mediator; so also is the range of possible solutions that most lawyers will recognize as valid. See S. SCHEINGOLD, *supra* note 93, at 153.

106. Psychologist-lawyer Robert Redmount has described three types of personalities among lawyers. Redmount, *Attorney Personalities and Some Psychological Aspects of Legal Consultation*, 109 U. PA. L. REV. 972, 974 (1961). Two types, the "zealous, aggressive" and "coping, competitive" lawyers, *id.* at 974-75, 977-78, probably would view reality more-or-less as shown on the lawyer's standard philosophical map. They would not lean toward mediation. Lawyers in the third category are "empathic, conciliatory" and would have a more inclusive perspective that would incline them toward mediative activities. *Id.* at 976-77.

One reason for the dominance of this map is that it may be congruent with the personalities of most lawyers, who may be drawn to the law because of this map and the ability to control that it gives them.¹⁰⁷ There are other reasons, though, for its strength, and some of these impress the map's contours on the minds of even the most conciliatory attorneys. First, it is consistent with the expectations of most clients.¹⁰⁸ Second, it is very often functionally effective in achieving the kinds of results generally expected from a "victory" in the adversary system. Third, it generally redounds to the economic benefit of lawyers, and often of clients.¹⁰⁹ Fourth, it gives the appearance of clarifying the law and making it predictable.¹¹⁰ Fifth, it accords with widely-shared assumptions that we will achieve the best society by giving individual self-interest full expression.¹¹¹

107. In his study of German lawyers, Walter Weyrauch wrote:

It is perhaps not impossible that legal education and legal processes provide attraction and an outlet to a specific kind of personality. Preoccupation with rules or rituals, intellectualization of disturbing human problems, and seemingly detached and "cold" rationalizations are factors known to the psychiatrist from his contact with patients and familiar to anyone who has dealt with lawyers and law students. A profile of lawyers seems to emerge, some kind of a collective portrait of the styles in which lawyers think, speak, and act. They tend to be defensive toward such disciplines as sociology and psychology. They frequently adhere to a philosophy of individualism, denying that their actions could be governed by behavior patterns. They emphasize legal skills and professional responsibilities. Prestige and status are very important to them. They think in terms of respect and power hierarchies, and this may reflect in their involvement in questions of propriety, etiquette, procedure, jurisdiction, and reciprocal recognition.

....

In summary, lawyers as a group, contrary to common beliefs and formal resolutions, may have personality traits that counteract or retard a wide distribution of democratic values among all persons. Without being fully conscious of the social function of their behavior, they may participate in power plays and rationalize their decisions in terms of seemingly objective standards. In fact these standards may cover up unconscious predispositions and identifications, which frequently favor the status quo and established power alignments.

W. WEYRAUCH, *THE PERSONALITY OF LAWYERS* 278-79 (1964).

108. M. FRANKEL, *supra* note 41, at 63-64; May, *supra* note 6, at 51. William May writes:

Structurally the professional's relationship to the client resembles the relationship of the Lockean state to the citizen. Both the state and the professional owe their original authority to the threat of a negative. Both the citizen and the client are relatively passive beneficiaries of powers exercised by others. Both the citizen and the client are largely active at only two moments, the points of entry and exit, i.e., when ties are established and when they are dissolved.

Id. There are other similarities as well: "the orientation of the relationship to negative liberty; the satisfaction of wants, rather than the pursuit of ideals; and the encouragement of a transactional rather than a transformational understanding of the professional exchange." *Id.*

109. See M. FRANKEL, *supra* note 41, at 64.

110. See S. SCHEINGOLD, *supra* note 93, at 159.

111. See M. FRANKEL, *supra* note 41, at 10. This adversary perspective is fixed deeply in the American consciousness and draws heavily on the thinking of Adam Smith, Locke and Hobbes. See *id.*; May, *supra* note 6, at 50-51. As William May writes of our political vision:

[F]irst, it postulates an original condition of humankind characterized by individual autonomy. Second, it orients any subsequent society to the satisfaction of interests and wants rather than moral ideas. Third, it traces the origin of the state to supreme evil rather than supreme good. Fourth, it encourages a passive, rather than an active, notion of citizenship. And fifth, it holds to a transactional, rather than a transformational, understanding of leadership.

... [T]he ideal state of affairs is one in which people are free to act according to their own wants and interests rather than required to act according to moral ideals, either those of others or those espoused by organized society. The very concept of social contract implies that the foundation stone for civil society is self-interest.

Id. at 47-48.

For a more general discussion of the strengths and weaknesses of the lawyer's standard philosophical map, see text accompanying notes 185-92 *infra*.

A final, and dominant, source of the popularity of the standard map is legal education, which is thoroughly pervaded by this vision. Nearly all courses at most law schools are presented from the viewpoint of the practicing attorney who is working in an adversary system of act-oriented rules, a context that he accepts.¹¹² There is, to be sure, scattered attention to the lawyer as planner,¹¹³ policy maker,¹¹⁴ and public servant,¹¹⁵ but ninety percent of what goes on in law school is based upon a model of a lawyer working in or against a background of litigation of disputes that can be resolved by the application of a rule by a third party.¹¹⁶ The teachers were trained with this model in mind. The students bring a rough image with them; it gets sharpened quickly. This model defines and limits the likely career possibilities envisioned by most law students.

The adversary, rule/act perspective infuses not just the subject matter but also the educational process. Combined with the case method of instruction, it has a constricting effect. As David Smith has written:

In some respects, the case method contains within it the same infirmities inherent in the adversary process. In the same way that the adversary process shapes, determines and excludes evidence on the basis of whether it is 'relevant' to the hearing, the case reveals only those facts that shed light on the principle of law being exposed. And just as the adversary process excludes evidence which might be critical in exposing the more significant social problem underlying the particular symptomatic problem before the court, so the case typically excludes evidence of social problems that go beyond the narrow issue with which the case is concerned.¹¹⁷

This distinctive point of view colors many interpersonal relationships, too. The student must compete not just with his professors but with his classmates as well. Law schools have institutionalized the battle of wits.¹¹⁸

B. *Economic and Structural Considerations*

Many lawyers, if they thought about it, would see mediation as an economic threat.¹¹⁹ To begin, mediation can remove some cases entirely from the hands of lawyers. When the parties want legal advice, however, combining this advice with mediation services offers advantages to certain kinds of disputants in certain kinds of cases.¹²⁰ At the same time, many lawyers who

112. See Goldstein, *The Unfulfilled Promise of Legal Education*, in LAW IN A CHANGING AMERICA 157, 161 (G. Hazard ed. 1968); S. SCHEINGOLD, *supra* note 93, at 156-58.

113. See L. BROWN & E. DAUER, *PLANNING BY LAWYERS* (1978).

114. See Lasswell and McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203 (1943).

115. See Reich, *Toward the Humanistic Study of Law*, 74 YALE L.J. 1402 (1965).

116. See S. SCHEINGOLD, *supra* note 93, at 159.

117. Smith, *supra* note 12, at 215.

118. For a discussion of the law school socialization process, see Hannan, *Knocking Which Corners Off? The Study of Law as a Mechanism of Social Integration*, 8 VICT. U. WELLINGTON L. REV. 379 (1977).

119. For a view that it is not such a threat, see text accompanying notes 140-44 *infra*.

120. See text accompanying notes 16-41 *supra*.

normally handle such cases might fear the financial impact of using mediation or providing it themselves.

Legal fees are generally based upon a portion of the amount recovered or on an hourly rate. Mediation threatens to reduce the amount recovered, because in settling their dispute, the parties may wish to include nonmaterial considerations: for instance, to trade money for respect or recognition. The lawyer who is paid by the hour—to the extent he is motivated by fees—also may view mediation dimly. Whether the mediation is performed by the lawyer himself or another mediator, it is likely to save some of the lawyer's time. Thus, the lawyer who brings mediation into a case that he could handle in an adversary manner will often earn less than he otherwise would have on that case.

He may also earn less in the future from the clients involved in that case. Through mediation, the parties may have learned to manage their relationships in such a way as to lessen their future dependence upon lawyers.¹²¹ Even if the clients have the need, if the lawyer serves as mediator himself, he will be barred from representing any of them in matters connected with the mediation.¹²² He may fear, in addition, that they would not want to employ him as an adversary lawyer, even in unrelated matters, because they no longer think of him as their valiant champion.

To the extent that a lawyer begins to function explicitly as a mediator, he loses some of the power connected with the distinctiveness of his functions. This may weaken the client's perceived need for a lawyer or his wish to retain this one. It also may jar the lawyer's own sense of professional integrity and role identification.¹²³

C. Absence of Mediation Education For Lawyers

The third reason that few lawyers understand mediation or wish to be connected with it in their work is that they have never been educated about mediation or trained in mediation skills. Until quite recently they had almost no opportunity to do so. Today the situation is somewhat improved. Although only a few law schools provide any exposure to mediation outside the labor relations context,¹²⁴ some neighborhood justice centers and court- or com-

121. This should be an important goal of mediation. See Fuller, *supra* note 37, at 325–26.

122. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-20 (1980) provides:

A lawyer is often asked to serve as an impartial arbitrator or mediator in matters which involve present or former clients. He may serve in either capacity if he first discloses such present or former relationships. After a lawyer has undertaken to act as an impartial arbitrator or mediator, he should not thereafter represent in the dispute any of the parties involved.

See also *id.* DR 5-105.

123. See Friedman, *supra* note 45, at 42; Stone, *supra* note 101, at 402.

124. On April 17, 1981, I sent letters to the deans of all ABA approved law schools and recognized Canadian law schools requesting, among other things, "[a]n indication of whether your law school offers a course or seminar on alternative (especially non-adversarial) methods of dispute resolution such as mediation, and, if so, the name of the responsible faculty member."

Over 70% (131 out of 181) of the schools responded. Ten mentioned a course or seminar that dealt with mediation. At Boston College, "some mediation is taught" in a Criminal Process clinical program. Letter from

munity-based mediation programs offer training to lawyers and nonlawyers alike, as does the Family Mediation Association in the five-day programs that it presents around the country.¹²⁵ And the Center for the Development of Mediation in Law puts on workshops designed primarily for lawyers.¹²⁶ Each of these opportunities is relatively new, and each requires a good deal of initiative on the part of the lawyer. Together, they have touched only a miniscule proportion of the bar; but they may well mark the beginnings of a significant development in the education of lawyers.

Mediation education for many more lawyers is required if our society is to make optimum use of mediation. I am speaking not only of education *about* mediation; I mean to include skills training provided experientially. The unique satisfactions and frustrations of mediation; the personal and professional conflicts it raises; the tendencies inherent in both the legal and the mediational perspectives toward undermining the salutary contributions of the other; the willingness and ability of an individual lawyer to mediate or help determine whether a given case is suitable for mediation—each of these can be grasped better if the intellectual content is suspended in the gel of experience, even if that means running a mock mediation.

A lawyer's openness to mediation and his ability to mediate will be directly and intricately related to the compound of his personality and his stage in life and in practice.¹²⁷ Some, with sensitive and conciliatory personalities, would be interested in mediation—if they had a chance to know about it—as early as law school. Others would be far too concerned with the real

Dean Richard Huber (April 27, 1981). Students at Capital University serve as mediators in a Night Prosecutor's Program. Letter from Director of Admissions C. Ricksecker (May 26, 1981). At Case Western Reserve, mediation is included in a required first year course called Conflicts Resolution. Letter from Associate Dean H. Ross (undated). A Seminar on the Negotiation and Mediation of Domestic Disputes is taught by Professor Susan Lewis at Duke. Letter from Duke University School of Law (undated). Professor Alan Widiss teaches a negotiation and mediation class at the University of Iowa. Letter from Assistant to the Dean A. Scieszinski (April 20, 1981). A course on alternative methods of dispute resolution is offered by Professor Richard Berg at Santa Clara. Letter from Dean George Alexander (April 23, 1981). Mediation is included as part of a Small Claims Court Evening Clinical Program at Southwestern, coordinated by Professor Georgia Torres Rizk. Course Description, Summer Session 1981, Small Claims Clinical Program, Southwestern University School of Law. Professors Richard Ellison and Robert Rabin at Syracuse offer a course on Conflict Resolution. Letter from Assistant to the Dean R. Ingles (May 18, 1981). Professor Paul H. Sanders teaches a seminar on Conflict Resolution and the Legal Process at Vanderbilt. Letter from Administrative Assistant to the Dean P. Ogle (May 19, 1981). The University of Western Ontario offers a course on Dispute Settlement, which is taught by Professor E. E. Palmer. Letter from Assistant Dean D. McNair (May 22, 1981).

I am aware of a few other offerings. At Harvard, a course on mediation is given by Professor Frank Sander. Letter from Prof. Frank A. E. Sander (Dec. 9, 1981). Gary Friedman teaches a course in mediation at the New College Law School in San Francisco. Interview with Gary Friedman, June 22, 1981. I teach mediation as parts of courses on Legal Interviewing and Counseling and Family Law, and I plan to offer a separate course on mediation in the near future.

125. *Training Programs*, FAM. MEDIATOR, Nov. 1981, at 4. The Academy of Family Mediators, formed in late 1981 by members of the Executive Board of the Family Mediation Association. Letter from Academy of Family Mediators Organizing Committee (undated), is beginning to offer mediation training programs across the country. The Academy of Family Mediators, *Divorce Mediation: A Five Day Introductory Training Program* (Feb. 11-15, 1982).

126. Center for the Development of Mediation in Law, *The Practice of Mediation, A Workshop for Lawyers and Other Professionals* (August 19-23, 1981).

127. Redmount, *supra* note 106, at 980-82.

difficulties of learning to be a lawyer and finding a job. Their interest would develop, if at all, only after practice brings them to despair about some aspects of the adversarial orientation. But even these people, if exposed to mediation in law school, could begin to enrich their philosophical maps and their ideas of what "a lawyer" can properly do. A large block of lawyers who already practice in a "mediational" way within the confines of their adversarial role might be lured into a heavier involvement with mediation *per se* if somehow they became familiar with mediation in a context that was congenial to their lives as lawyers. Finally, I suspect that a large part of the bar—because of its reliance upon the lawyer's standard philosophical map and the instrumental value of that map—would never become enthusiastic about or even interested in mediation.

Because of this variability in lawyers' openness to mediation and the impact that mediation education can have on an individual lawyer's world view,¹²⁸ such education must be available to both law students and graduates. This means that mediation should be part of the law school curriculum and of continuing education programs, which typically are sponsored or controlled by the bar.

The pervasiveness of the standard lawyer's philosophical map and the assumption that increased use of mediation is an economic threat to the profession will impede the development of high quality mediation education for lawyers. Moreover, just as doing mediation may threaten a lawyer's sense of professional integrity and distinctiveness,¹²⁹ teaching mediation to lawyers may threaten the integrity and distinctiveness of the bar or law schools. Additionally, both of these institutions tend to follow rather than lead their constituents, to deal with what is, rather than what should be.

Yet it seems almost certain that the bar and law schools will increasingly support some kinds of education about mediation. My fear is that innovation will be constrained by a notion that mediation is simply another nonjudicial method of resolving minor disputes, to be judged mainly by its ability to reduce court congestion and process cases that traditionally have not produced significant fees for lawyers.¹³⁰ From this perspective, which could ignore mediation's potential for fostering or suppressing justice,¹³¹ not much depth is required in lawyers' mediation education.

III. TAILWINDS: FORCES FOR LAWYERS' PROPER INVOLVEMENT IN MEDIATION

In my description above of the forces pushing against proper involvement of lawyers in mediation, I concentrated upon conservative perspectives. The

128. See text accompanying note 184 *infra*.

129. See text accompanying note 123 *supra*.

130. The title of a panel discussion at a recent ABA annual meeting is some inspiration for this fear. ABA, Alternative Dispute Resolution: Bane or Boon to Attorneys? (New Orleans, August 11, 1981).

131. See Hofrichter, *supra* note 20, at 168.

resistance to mediation in law firms, bar associations, and law schools that is based upon economic and structural considerations stems from a "bureaucratic" mentality, that is, one geared toward maintaining or increasing the power or wealth of the legal profession. Similarly, the lawyer's standard philosophical map is concerned more with the "is" than with the "ought" of law. I wish to make clear, however, that these perspectives can support, as well as retard, increased involvement in mediation by lawyers. In addition, there are "higher" points of viewing that can move the legal profession in this direction.¹³²

A. Conservative Forces

Consumer demand for mediation services is likely to increase. This development will be fueled in part by a desire to avoid the harshness and high cost of adversary processing, the same wish that inspired no-fault systems for automobile accident compensation¹³³ and divorce¹³⁴ and the growth of comparative negligence.¹³⁵ The demand for mediation also will be enhanced by forces associated with the self-help¹³⁶ and "Small is Beautiful" movements.¹³⁷

Plainly, there will be conservative forces impelling lawyers, bar associations, and law schools to become involved in this growth activity. At base there is the matter of protecting turf. In the bureaucratic perspective, as demand grows for mediation of matters currently handled by adversary processes, the bar as a whole may perceive that it is losing power, control, or money unless it gets involved.¹³⁸ Moreover, the disputants' needs for legal advice may be seen as so great as to compel the profession to step forward to protect them.¹³⁹

132. Phillippe Nonet and Phillip Selznick describe three developmental stages of law—repressive, autonomous, and responsive—that can exist simultaneously within various segments of the same legal order. P. NONET & P. SELZNICK, *LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW* (1978). Repressive law serves the interests of the elite. Its main function is to keep order, and under it, officials have almost unbridled discretion. *Id.* at 40–41. Autonomous law has as its principal end the legitimation and maintenance of the existing system. It is characterized by procedure and legalism. *Id.* at 54. Responsive law is dominated by a strong sense of purpose—serving the needs of individuals and society. *Id.* at 73–74. Therefore, it is less legalistic than autonomous law and "brings a promise of *civility* to the way law is used to define and maintain public order." *Id.* at 90. It is characterized by competence. *Id.* at 98. These types of law correspond to what other scholars have identified as stages in the development of organizations: pre-bureaucratic, bureaucratic, and post-bureaucratic. *Id.* at 99–100.

I have already suggested that mediation could be used to bolster a repressive regime. See text accompanying notes 51–52 *supra*. In this Part, I seek to demonstrate that forces which could support greater involvement in mediation by lawyers are found in both middle and higher stages of bureaucracy and law.

133. See J. O'CONNELL & R. HENDERSON, *TORT LAW, NO-FAULT AND BEYOND* 33 (abr. ed. 1976).

134. See C. FOOTE, R. LEVY & F. SANDER, *CASES AND MATERIALS ON FAMILY LAW* 1102 (2d ed. 1976).

135. See V. SCHWARTZ, *COMPARATIVE NEGLIGENCE* 31 (1974).

136. See *Mediation—Dispute Resolution Programs*, in *PEOPLES' LAW REVIEW* 201 (R. Warner ed. 1980).

137. Smith, *supra* note 12, at 209. See text accompanying notes 176–80 *infra*.

138. See note 130 and text accompanying notes 119–23 *supra*.

139. The danger is that lawyers acting from these two motives are likely to over-legalize the mediation process, sapping the strength associated with its flexibility.

The increased demand for mediation services can affect the practicing lawyer in several ways. Disputants who initially seek mediation, rather than legal services, will need legal advice during and after the mediation. Mediators will tend to refer such work to lawyers who understand and are not unnecessarily disruptive of the process. Sometimes the initial contact by parties seeking mediation will be with a lawyer. Should the disputants and the matter seem suitable for mediation, there are several professionally advantageous ways that the lawyer can provide such services.¹⁴⁰

Thus, as more people come to understand mediation, there will be increasing monetary rewards for individual lawyers who can mediate or advise clients who are mediating. The heightened call for legal services connected with mediation will create a demand from lawyers and law students for instruction in mediation. Both the bar and law schools are inclined toward providing training of the sort that their constituents (lawyers and law students) want—unless there are countervailing considerations. Aside from the lawyer's standard philosophical map,¹⁴¹ the most significant obstacle to the provision of some kind of mediation education by law schools and the bar is the perception that the increased use of mediation may be detrimental to the income of lawyers.¹⁴² Though this perception may be accurate as applied to many lawyers, there is one line of thought that may make mediation appealing even to those who are principally concerned about protecting the financial security of the bar.

It is true that mediation typically will cost the clients much less than adversary processing.¹⁴³ The lawyer who converts an adversarial case into a mediation may, therefore, take a great fee reduction on *that* case.¹⁴⁴ Mediation, however, is not necessarily a money loser for either individual lawyers, firms, or the bar as a whole. Many lawyers and firms have more work than they can handle and are in the habit of turning away cases when they feel too busy. They would not lose fees by converting an adversary case into a mediation nor by advising a client who is in mediation, since they can apply the time saved to other fee-generating matters. In addition, some lawyer-mediators' practices may develop so that virtually all of their billable time is spent on mediations.

It is possible that some lawyer is losing a fee every time a mediation takes place. But it does not follow that as mediation-*cum*-legal advice becomes more common the total number of hours billed by lawyers will decline and, therefore, that the bar as a whole will lose money. As mediation, properly combined with legal advice, becomes widely available, lawyers will be able to

140. See text accompanying notes 58–83 *supra*.

141. See text accompanying notes 90–118 *supra*.

142. See text accompanying notes 119–23 *supra*.

143. Friedman, *Mediation: Reducing Dependence on Lawyers and Courts to Achieve Justice*, in PEOPLES' LAW REVIEW 42, 46 (R. Warner ed. 1980). See Bahr, *supra* note 33, at 32.

144. See text accompanying notes 119–20 *supra*.

help many people who currently cannot afford legal services, thus swelling the ranks of paying consumers.

B. *Progressive Forces*

Though the preceding argument may not dispel worries about lawyers' financial security, "higher" perspectives in jurisprudence, in the orientations of individual lawyers and the bar, and in the goals of legal education can pull the legal profession toward appropriate and deeper involvement with mediation.

There are streams in modern legal philosophy strong enough to carry mediation into prominence on the lawyer's map. A few examples: Both sociological jurisprudence and some branches of American legal realism were aimed at making law responsive to society's needs, in part by expanding the notion of what—beyond its rules—is relevant to law.¹⁴⁵ The jurisprudence of Myres McDougal and Harold Lasswell similarly downplayed the importance of authoritative rules in favor of marshalling all available knowledge with a goal of advancing human dignity.¹⁴⁶ A strong sense of purpose is present also in the work of Lon Fuller,¹⁴⁷ who was also concerned with the *quality* of the order created by the legal system.¹⁴⁸ He urged a focusing of attention on the various forms of social ordering, including mediation.¹⁴⁹ In addition, he argued that more attention should be paid to the "customary law" that develops from the interaction among people,¹⁵⁰ and, indeed, that an important emphasis of law should be to facilitate such interaction,¹⁵¹ which, of course, is exactly what mediation does.

The role of intermediary has a long history in the legal profession.¹⁵² That role can provide much satisfaction to lawyers. Mahatma Gandhi relates that after he persuaded his victorious client to agree to accept installment payments instead of a lump sum, which the defendant would have been unable to deliver,

[b]oth were happy over the result, and both rose in the public estimation. My joy was boundless. I had learnt the true practice of the law. I had learnt to find out the better side of human nature and to enter men's hearts. I realized that the true function of a lawyer was to unite parties riven asunder.¹⁵³

145. P. NONET & P. SELZNICK, *supra* note 132, at 73-76.

146. Lasswell and McDougal, *Criteria For A Theory About Law*, 44 S. CAL. L. REV. 362, 365-68 (1971).

147. Summers, *Professor Fuller's Jurisprudence and America's Dominant Philosophy of Law*, 92 HARV. L. REV. 433 *passim* (1978).

148. *Id.* at 436-37.

149. Fuller, *supra* note 37, at 327; Fuller, *Some Unexplored Social Dimensions of the Law*, in *THE PATH OF LAW FROM 1967*, at 57, 60-61 (A. Sutherland ed. 1968); Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

150. Fuller, *Law As An Instrument of Social Control and Law as a Facilitation of Human Interaction*, 1975 B.Y.U. L. REV. 89, 94.

151. *Id.* at 95.

152. See Rich, *supra* note 89, at 777-79.

153. M. GANDHI, *AUTOBIOGRAPHY, THE STORY OF MY EXPERIMENTS WITH TRUTH* 168 (1948).

These and similar orientations, of course, have influenced the growth of a public interest perspective in many law firms and in the organized bar, which has long recognized that the lawyer's responsibilities extend well beyond the adversary function and include, in addition to direct service to the public, helping people collaborate.¹⁵⁴ This perspective favors the development of mediation training by some such firms and by bar associations.

Certain areas of law have moved sharply away from the strict adversarial win-lose orientation in response to individual and societal needs. I have already mentioned the development of no-fault systems of divorce and accident compensation law and the growth of comparative negligence.¹⁵⁵ The latest Restatement of Contracts contains several new sections that lend themselves to "half measures" of relief.¹⁵⁶ Moreover, in many cases courts impose or encourage compromise recoveries notwithstanding the formal reign of a winner-take-all philosophy.¹⁵⁷ The recent popularity of joint custody of children following divorce is another example.¹⁵⁸ Finally, a number of jurisdictions now have statutes requiring conciliation attempts for certain kinds of issues before adversary processing.¹⁵⁹

The responsive streams and some of their tributaries have been important influences in legal education, too. Though dealing with rules is still the primary learning in law school, the notion of what is relevant has widened in most classrooms to include political, economic, social, and emotional factors that do or should impact on decisions and the effects of decisions on individuals and society. A variety of efforts at heightening awareness of how law or legal education affects persons involved in these processes have been advocated or launched. These include focused attempts to blend law with behavioral science¹⁶⁰ or humanistic disciplines,¹⁶¹ which have impacted upon law school curricula in varying degrees, and a growing tendency to include "nonlegal" materials in casebooks.¹⁶² An emphasis upon nonadversarial per-

154. *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1160 (1958).

155. See text accompanying notes 133-35 *supra*.

156. For a discussion of these, see Young, *Half Measures*, 81 COLUM. L. REV. 19 (1981).

157. Coons, *Approaches to Court Imposed Compromise—The Uses of Doubt and Reason*, 58 NW. U.L. REV. 750 *passim* (1964).

For the view that the concern for "swift and certain justice" has contributed to the decline of certain procedures that are important to the adversary system, see Landsman, *The Decline of the Adversary System: How the Rhetoric of Swift and Certain Justice Has Affected Adjudication in American Courts*, 29 BUFFALO L. REV. 487 (1980).

158. See Folberg and Graham, *Joint Custody of Children Following Divorce*, 12 U.C.D. L. REV. 523 (1979).

159. CAL. CIV. CODE § 4607 (West Supp. 1980); WIS. STAT. ANN. § 767.081 (West Supp. 1980).

160. See, e.g., J. KATZ, J. GOLDSTEIN & A. DERSHOWITZ, *PSYCHOANALYSIS, PSYCHIATRY AND LAW* (1967); L. FRIEDMAN & S. MACAULY, *LAW AND THE BEHAVIORAL SCIENCES* (1969); R. POSNER, *ECONOMIC ANALYSIS OF LAW* (1972); C. REASONS & R. RICH, *THE SOCIOLOGY OF LAW: A CONFLICT PERSPECTIVE* (1978).

161. See, e.g., E. DVORKIN, H. LESNICK & J. HIMMELSTEIN, *BECOMING A LAWYER: A HUMANISTIC PERSPECTIVE ON LEGAL EDUCATION AND PROFESSIONALISM* (1981); J. NOONAN, *PERSONS AND MASKS OF THE LAW* (1976); Abramson, *Law, Humanities and the Hinterlands*, 30 J. LEGAL EDUC. 27 (1979); Smith, *The Coming Renaissance in Law and Literature*, 30 J. LEGAL EDUC. 13 (1979).

162. E.g., J. HENDERSON & R. PEARSON, *THE TORTS PROCESS* (2d ed. 1980); C. FOOTE, R. LEVY & F. SANDER, *CASES AND MATERIALS ON FAMILY LAW* (2d ed. 1976).

spectives has emerged in some courses on interviewing and counseling,¹⁶³ human relations training,¹⁶⁴ planning,¹⁶⁵ and negotiations.¹⁶⁶ The growth of clinical legal education provides a window for the exploration of human issues in lawyering.¹⁶⁷ In addition, efforts to bring human dimensions into legal education—such as the Project for the Study and Application of Humanistic Education in Law, based at Columbia Law School,¹⁶⁸ and Harvard Law School's Fellowships in Law and Humanities program¹⁶⁹—have prospered alongside the more traditional law and economics programs, which tend to fit squarely on the lawyer's standard philosophical map.¹⁷⁰

Some allegiance to serving the public interest can probably be found in nearly any law school. While many in the legal and law teaching professions hold that training people to be competent and conscientious lawyers is itself a public service—on the assumption that what lawyers do redounds to the benefit of society¹⁷¹—leading scholars have advocated a direct commitment to the public good,¹⁷² and some law schools have explicitly¹⁷³ or implicitly¹⁷⁴ embraced such a goal. The recognition of an obligation to serve the general welfare, even when it is severely limited,¹⁷⁵ is one strap that can support further involvement of law schools in mediation training.

These forces pushing toward expansion of appropriate involvement in mediation by lawyers are likely to be enhanced by developments in our society. Daniel Yankelovich has argued that American psychoculture has

163. Goodpaster, *The Human Arts of Lawyering: Interviewing and Counseling*, 27 J. LEGAL EDUC. 5, 6 (1975); see T. SHAFFER & R. REDMOUNT, *LEGAL INTERVIEWING AND COUNSELING* (1980); T. SHAFFER, *LEGAL INTERVIEWING AND COUNSELING IN A NUTSHELL* (1976).

164. HARVARD LAW SCHOOL CATALOGUE 79 (1980).

165. See L. BROWN & E. DAUER, *supra* note 113.

166. See H. EDWARDS & J. WHITE, *PROBLEMS, READINGS, AND MATERIALS ON THE LAWYER AS NEGOTIATOR* (1977).

167. See Stone, *supra* note 101, at 429-30.

168. For information on this program, see Himmelstein, *Reassessing Law Schooling: An Inquiry Into The Application of Humanistic Educational Psychology To The Teaching of Law*, 53 N.Y.U. L. REV. 514, 558-59 (1978); see generally HUMANISTIC EDUCATION IN LAW, Monograph III (1982).

169. See Kirshen, *Humanization of Lawyers at Harvard*, 61 A.B.A. J. 223 (1975).

170. See Guzzardi, *Judges Discover the Wonderful World of Economics*, FORTUNE, May 21, 1979, at 58, 66.

171. This seems to be an implicit assumption of the unusually comprehensive study of legal education by Gee and Jackson. See Gee and Jackson, *Bridging the Gap: Legal Education and Lawyer Competency*, 1977 B.Y.U. L. REV. 695.

172. See Lasswell and McDougal, *supra* note 114; Reich, *supra* note 115; Graetz and Whitebread, *Monrad Paulsen and the Idea of a University Law School*, 67 VA. L. REV. 445 (1981).

173. UNIVERSITY OF BRIDGEPORT SCHOOL OF LAW 1980-81 (bulletin) at 10 provides: "The primary goal of this Law School is to provide an excellent professional education in the public interest." The City University of New York Law School, opening in 1983 in Queens, will have a "special orientation towards public interest law and public service. . . ." AALS Newsletter, Mar. 1982, at 7.

174. See, e.g., UNIVERSITY OF SAN DIEGO SCHOOL OF LAW 1979-81 BULLETIN at 12-13; UNIVERSITY OF VIRGINIA SCHOOL OF LAW RECORD 1980-81, at 7.

175. The Harvard Law School

tries to prepare its graduates to deal with legal problems as they arise wherever the common law prevails. It seeks to accomplish this purpose by providing comprehensive training for practice of the legal profession and also by furnishing an *enlightened background for those interested in public service* at the local, state, federal and international levels, in and out of public office and for law teachers and legal scholars.

HARVARD LAW SCHOOL CATALOG at 16 (1980-81) (emphasis supplied).

passed from an ethic of self-denial to an ethic of self-fulfillment, and now, because the economic decline makes the self-fulfillment ethic unreasonable (and because it did not bring self-fulfillment anyway), we are beginning to move toward an ethic of commitment.¹⁷⁶ The self-fulfillment ethic is compatible with the adversary win-lose orientation because the self is equated with a group of needs, wants, and desires without reference to the interests of others.¹⁷⁷ It sees the self in isolation. One result of our competitive and instrumental orientation has been the often-noted "dehumanization" of contemporary American society.

The new ethic of commitment, on the other hand, springs from a desire in individuals for a better balance between the material and the "sacred/expressive" aspects of life.¹⁷⁸ It involves necessarily a shift from the self, from a focus on inner needs, toward a "connectedness with the world," a search for a sense of community, and "by breaking through the iron cage of rationalism and instrumentalism," an attempt to "make industrial society a fit place for human life."¹⁷⁹ An important part of the new ethic is to take control over one's own decision making and to defer less to power-elites such as lawyers.¹⁸⁰

Yankelovich may be overly facile in identifying holders of the new ethic or designating them a vanguard.¹⁸¹ But to the extent his perceptions are valid, we can anticipate more people wishing to use mediation instead of adversary processes. The shift in ethic similarly would incline many lawyers and law students toward learning about and doing mediation.

IV. DOWNWASH:¹⁸² (POSSIBLE) BENEFITS OF THE GROWTH OF MEDIATION EDUCATION FOR LAWYERS

Mediation education for lawyers is essential if our society is to make the best use of mediation.¹⁸³ This best use would save people time and money and a portion of the emotional turmoil that often accompanies adversary processing. It would protect the legal rights of the disputants and yield resolutions that suited their needs. In addition, the development of mediation and mediation education for lawyers could strengthen the various progressive forces described in the preceding section. The spread of mediation could do much to improve the quality of life in our society, not only because of the savings it brings, but because it fosters interaction among people and empowers them to control their own lives.

There are similar benefits—not very certain, but profoundly important—that could follow merely from the development of mediation education for

176. D. YANKELOVICH, *supra* note 6, at 250.

177. *Id.* at 256-57.

178. *Id.* at 254-55.

179. *Id.* at 262.

180. *Id.* at 263.

181. See Wrong, Book Review, *NEW REPUBLIC*, Sept. 9, 1981, at 28.

182. "Downwash" is a "downward component of air velocity in the neighborhood of the wing" of a moving airplane. J. ANDERSON, *INTRODUCTION TO FLIGHT* 179 (1978).

183. See text accompanying notes 84-89 *supra*.

lawyers. The provision of good quality mediation-*cum*-legal services could help lawyers, the bar, and the law schools fulfill the strong impulses—frequently shaded on the lawyer's standard philosophical map—to make law more responsive to the needs of individuals and society. Properly done, mediation training can enhance the learner's awareness of his own emotional needs and value orientations and those of others. It should expand his ability to understand both sides of a case—not just with his head but with his heart as well. These sensitivities can, of course, make the lawyer better able to perceive his clients' needs and, on a purely instrumental level, to work more effectively with all manner of people.

And there is much more to it. Mediation highlights the interconnectedness of human beings.¹⁸⁴ Lawyers who notice the interconnectedness are less vulnerable to the kind of over-enthusiasm with the adversary role that has brought about much of its sinister reputation. Lawyers who can experience both sides of a controversy—not merely understand the legal arguments—will have an awareness of consequences that can become a guide to their conduct which can compete with the established rules of lawyers' behavior. This may, when appropriate, blunt the edge of their adversarialness. It may also help them recognize that although their individual clients may be doing fine, in many ways the judicial system is not serving most people well.

I do not mean to indict the lawyer's standard philosophical map. In many cases, lawyers must use it. Most clients and judges expect them to. Moreover, the adversary-rule perspective from which the standard map is drawn has real strengths.¹⁸⁵ It promotes a loyalty to clients. It encourages vigorous presentation of competing positions and interests. The rule orientation fosters in the lawyer an allegiance to the system of laws, which in turn serves to unify society, to provide a measure of security of expectations, and to keep open possibilities of fairness between persons irrespective of status and of vindication of the rights of the downtrodden. But at the same time, the lawyer's conventional view of the world permits a great deal of misery. It does this by dominating the professional consciousness of most lawyers and legal educators too fully, crowding or crowding out other views.¹⁸⁶

An enormous percentage of potential consumers of legal services are either ill-served or not served at all by our legal system.¹⁸⁷ Many people can afford a lawyer only when a contingent fee arrangement is feasible. Those who can get into the litigation process will find it enormously time consuming, expensive, uncertain, and unpleasant unless their lawyers can arrange settlements.¹⁸⁸ And much of this results directly from the over-zealousness with which many lawyers routinely embrace their adversarial roles.¹⁸⁹ Many law-

184. See Northrop, *supra* note 4, at 358–59.

185. See *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1160 (1958).

186. See text accompanying notes 90–118 *supra*.

187. See generally VERDICTS ON LAWYERS (R. Nader & M. Green eds. 1976).

188. See M. FRANKEL, *supra* note 41, at 18–19.

189. *Id.* at 36.

yers tend to delay and obscure the truth in the service (usually) of their clients' financial interest.¹⁹⁰ Often they "exacerbate and prolong the contest rather than . . . arrive at a quiet compromise."¹⁹¹

That this situation persists can be attributed in no small measure to the strength of the lawyer's standard philosophical map. The atomistic perspective, the inclination to accept the adversary system as it is and assume that it is useful, the focus on legal rights and interests (often reduced to monetary terms), the assumption of an adversary stance¹⁹²—all these tendencies combine to permit the working lawyer to ignore, at least while he is working, the well-known adverse conditions that I set forth above.

A lawyer who has experienced the mediational perspective would have difficulty keeping on his adversarial blinders and would be more likely, therefore, to acknowledge the serious difficulties in our current adversary system. The mediation experience also may encourage the lawyer to come up with creative solutions to systemic as well as individual problems. Mediation training and practice can help lawyers question the many (often unconscious) value presuppositions that underlie normal lawyer behavior—for example, assumptions about adversariness and rules, how lawyers behave, and what clients want—from which we tend to operate automatically.¹⁹³ Mediation training, in other words, may help lawyers break out of the "mental grooves and compartments"¹⁹⁴ characteristic of the lawyer's conventional world view. This can lead not just to mediation but to legal services that are more responsive to the needs of clients and of society.

Mediation training offers law schools some special advantages. It could aid them enormously in dealing with the old issue of teaching professional responsibility.¹⁹⁵ Many of the most difficult problems of legal ethics derive from the adversary perspective that pervades the *Model Code of Professional Responsibility*. A mediation course could force students to confront and come to grips with their own relationship to the adversary system.¹⁹⁶ It could help them examine the suppositions underlying the adversary-rule orientation and decide when these make sense and when they do not. Many sensitive law

190. *Id.* at 17.

191. *Id.* at 114.

192. See text accompanying notes 90–118 *supra*.

193. Cf. Bohm, *On Insight and its Significance, for Science, Education, and Values*, 80 TEACHERS COLLEGE RECORD 403, 414–15 (1979) ("[N]otice what actually happens when we make *value judgments*. In effect, these are conclusions concerning what is and what is not of value, and such conclusions are, of course, imprinted in memory as *presuppositions*. We then act immediately from this kind of presupposition, generally with little or no conscious awareness that this is what is actually happening.").

194. *Id.* at 414. Bohm argues that the development of "insight" should be a focus of education: [T]he ordinary state of mind tends to be one of *hubris*, in which each person is inclined to think that his basic notions are some kind of final truth. This may well be one of the greatest barriers of all to insight. Only when such hubris is absent can the mind flow freely in new directions that allow reason to develop in original ways.

Id. at 408–09.

195. For thoughtful examination of this subject, see M. KELLY, *supra* note 97.

196. This is an explicit objective of the mediation course taught by Gary Friedman at New College School of Law in San Francisco. Interview with Gary Friedman (June 23, 1981).

students are repelled by the strength and pervasiveness of the lawyer's usual world view and drop—literally or figuratively—out of the competitive atmosphere that blankets law school and law practice. Teaching mediation can demonstrate that there is room for these people in the legal profession and in law school. It can not only soften the adversary perspective, but present an alternative role model as well. Thus, mediation training can do for law students what mediation can do for disputants: help them decide for themselves what they want to do with their lives.¹⁹⁷

197. Krishnamurti has argued that an important function of education should be to help students understand themselves, to discover what they most care about. J. KRISHNAMURTI, *ON EDUCATION* 94 (1974). The Legal Profession course offered at Harvard Law School by Professors Andrew Kaufman and Michael David Rosenberg encourages "students to address the questions, what kind of lawyer do I want to be and to what kind of profession do I wish to belong." HARVARD LAW SCHOOL CATALOGUE 93 (1979-1980). My own less-than-successful attempt to provide this kind of service to students is recounted in Riskin, *On Teaching With Love*, HUMANISTIC EDUCATION IN LAW, Monograph III at 57 (1982).